

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 19 September 2005**

**BALCA Case No.: 2004-INA-00324**  
**ETA Case No.: P2003-NJ-02497568**

*In the Matter of:*

**CCI CONSTRUCTION, INC.,**  
*Employer,*

*on behalf of*

**MARCELO CARVALHO,**  
*Alien.*

Appearance: Wall Street Associates, Inc.  
Newark, New Jersey  
*For the Employer and the Alien*

Certifying Officer: Dolores DeHaan  
New York, New York

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from CCI Construction's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.<sup>1</sup> We base our decision on the record upon which the CO denied

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

## **STATEMENT OF THE CASE**

On September 21, 2001, Employer filed an application for labor certification on behalf of Alien, seeking to fill the position of "Truss Carpenter" and requiring three years of experience. (AF 136-148). Employer requested Reduction in Recruitment ("RIR") processing. (AF 148).

On April 1, 2004, the CO issued a Notice of Findings ("NOF") denying Employer's request for RIR and proposing to deny labor certification pursuant to sections 656.3 and 656.20(c)(8). The CO noted that Employer listed itself as a commercial contractor as opposed to a residential contractor on form 750A. The CO explained that Employer had to demonstrate that it could guarantee permanent, full-time employment to Alien performing the job duties listed on form 750A: erecting pre-made wood roof trusses on top plates of frame structures. Accordingly, Employer was instructed to provide copies of contracts and invoices from 2001 through 2004 demonstrating the need for a full-time truss carpenter. In addition, Employer was instructed to submit the names and job duties of its employees from 2001 through 2004; W-2 or 1099-MISC forms for 2001 through 2003; and Federal tax returns for 2001 through 2003. The CO also requested various corrections to Forms 750A and B, including an updated work history for Alien. Employer was instructed to demonstrate its willingness to advertise, which would be contingent upon successfully rebutting the NOF. Finally, the NOF advised Employer that "[e]fforts to cure the above deficiencies, after the expiration of the rebuttal period, cannot be considered by the Department of Labor." (AF 117-18).

On May 6, 2004, Employer filed a rebuttal that contained a corrected form 750A and B, two copies of Alien's W-2 forms from 2001 through 2003, and copies of Employer's tax returns from 2001 through 2003. The rebuttal did not contain a cover letter or an explanation for not submitting all the documents requested in the NOF. (AF 45-116).

On May 19, 2004, the CO issued a Final Determination denying labor certification pursuant to § 656.20(c)(8). The CO noted that the rebuttal contained no correspondence from Employer or its attorney and that Employer had failed to provide the names of his workers, their job duties, and whether they were part-time or full time from 2001 through 2004. In addition, the CO noted that Employer did not explain if it specialized in a particular area of construction and failed to provide contracts, invoices or similar evidence to demonstrate its ability to guarantee permanent, full-time employment to a truss carpenter. Accordingly, the CO denied certification. (AF 36-37). On June 14, 2004, Employer requested review of the Final Determination. (AF 4-41). The Board of Alien Labor Certification Appeals (“Board”) docketed the case on August 13, 2004.

## **DISCUSSION**

In its Request for Review, Employer submitted new evidence not previously presented to the CO: an explanation of the construction services it performs, a list of its employees from 2001 through 2004, and invoices and contracts for various services performed in 2003 and 2004. The Board cannot consider this material, as our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Moreover, Employer was explicitly informed that efforts to cure deficiencies in the NOF cannot be considered if submitted beyond the rebuttal deadline. (AF 118). Further, where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

An employer petitioning for permanent alien labor certification must demonstrate that the job opportunity offered to the alien “has been and is clearly open to any qualified U.S. worker.” § 656.20(c)(8). A “totality of the circumstances” test is used to determine whether a job opportunity is *bona fide*. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). The burden of

showing that the job opportunity is *bona fide* is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Here, the CO denied certification because Employer failed to demonstrate that a *bona fide* job opportunity existed. In the NOF, the CO properly requested that Employer submit tax documents, invoices demonstrating the need for a truss carpenter, and a list of its employees' names and job duties to verify that it could guarantee permanent, full-time employment to Alien. See *Gencorp*, 1987-INA-00659 (January 13, 1988) (*en banc*) (a CO may request a document which has a direct bearing on the resolution of an issue.). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification, *Edward Gerry*, 93-INA-467 (Jun. 13, 1994), especially where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991). Employer produced only some of the documentation requested in the NOF and offered no explanation for its failure to provide the invoices and contracts and list of its employees. Therefore, Employer did not meet its burden, and the CO properly denied certification.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.*, however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW  
Suite 400 North  
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.